rvice and receipt of a copy of the within is hereby admitted

_____day of June, 1929.

_____

Counsel for Petitioner.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 99

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1929
CERTIORARI GRANTED OCTOBER 14, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 99

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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1 Before U. S. Board of Tax Appeals

Docket 7873

GUY C. EARL, 2914 McCLURE ST., OAKLAND, CALIF., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For the taxpayer: H. H. Tooley, Esq.; Warren Olney, jr., Esq.; J. M. Mannon, jr., Esq.; Henry D. Costigan, Esq.; Wm. G. Feely, Esq.

For the commissioner: M. E. McDowell, Esq.; V. J. Hefferman, Esq.

Docket entries

1925

Oct. 7—Petition received and filed.
Oct. 12—Copy of petition served on solicitor.
Oct. 12—Notification of receipt mailed taxpayer.
Oct. 29—Answer filed by solicitor.
Nov. 10—Copy of answer served on taxpayer. Assigned to field calendar.

1927

May 6—Hearing date set July 8, 1927, at San Francisco, Calif.
2 July 8—Hearing had before Mr. Trammell. Briefs due Sept. 15/27.
Aug. 8—Motion for an extension to 10–15–27 to file brief filed by taxpayer.
Aug. 9—Granted. Both sides notified.
Aug. 23—Transcript of hearing 7–8–27 filed.
Oct. 13—Brief filed by taxpayer.
Oct. 13—Brief filed by G. C.

1928

Feb. 14—Findings of fact and opinion rendered (Trammell). Judgment will be entered for the commissioner.
Feb. 16—Order of redetermination entered.
Aug. 1—Supersedeas bond for $9,705.16 approved and ordered filed.
Aug. 1—Notice of withdrawal of Homer H. Tooley as counsel for taxpayer filed.
Aug. 1—Notice of appearance of Warren Olney, jr., J. M. Mannon, jr., and Henry D. Costigan as counsel for taxpayer filed.
Aug. 2—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignment of errors filed by taxpayer.
Aug. 2—Statement of evidence lodged.
Aug. 2—Proof of service of petition filed.
Aug. 2—Proof of service of statement for hearing 8–13–28 filed.
Aug. 8—Objections to statement of evidence and notice of service filed by G. C.

Aug. 9—Hearing continued to 8-21-28 on settlement of evidence.

3 Aug. 21—Hearing had before Mr. Trammell. Order rejecting settlement of evidence as proposed by petitioner.

Sept. 12—Order denying inclusion of statement of evidence entered.
Sept. 12—Exception to order denying inclusion of statement entered.
Sept. 12—Præcipe with proof of service thereon filed by taxpayer.
Sept. 13—Consent to taxpayer's præcipe filed by G. C.

Now, September 24, 1928, the foregoing docket entries certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, Board of Tax Appeals.

Before United States Board of Tax Appeals

Petition

Filed Oct. 7, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:PA:4-GWF-406-60D) dated August 10, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual residing at 2914 McClure Street, Oakland, California.

4 2. The deficiency letter was dated August 10, 1925.

3. The taxes in controversy are income taxes for the calendar years 1920 and 1921 and are less than $10,000.00.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

The commissioner maintains that a joint tenancy agreement entered into between the taxpayer and his wife in 1901 does not extend to salaries, wages and commissions earned by him individually, but that such income is his separate income and should be reported on his return for income tax purposes. Any such income, the commissioner holds, assigned to his wife, partakes of the nature of a gift.

5. The facts upon which the taxpayer relies as the basis of his appeal are the following:

Under date of June 1, 1901, the taxpayer and his wife, Ella F. Earl, executed a certain contract in writing in the words and figures as follows:

OAKLAND, *June 1, 1901.*

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of

any and all such property shall be treated and considered and
5 hereby is declared to be received, held, taken, and owned by us as joint tenants and not otherwise with the right of survivorship.

GUY C. EARL.
ELLA F. EARL.

The said agreement has ever since the date thereof been and still is in full force and effect. There was ample consideration for the agreement. The wife, at the time the agreement was executed, had upwards of $30,000.00 of separate property which she put under the agreement. There was also community property existing at the time and each party had an expectancy of inheritance, etc. The taxpayer had no separate property. Under the California law no consideration was necessary for the complete and absolute validity of the agreement other than the mutual consent of the parties to such agreement. Even had neither of the contracting parties any separate property, or there had been no community property in existence, it was entirely competent for the parties to make a valid agreement on their mutual consent, unsupported by any other consideration. If such an agreement amounted to a gift by one spouse to the other, it would be perfectly valid and would control with respect to present property and all future properties, whether arising by earnings or otherwise. The future earnings upon the instant of coming into being would be controlled by the agreement. There would be no instant of time when they could be considered as belonging to the husband before the agreement would take effect.

6 Such is the clear meaning of the California law. The parties were resident in California and have ever since lived in California, the earnings were made in California, and the agreement has remained in effect during the taxable years under review.

In the year 1920 the taxpayer received as salary, fees, etc., the sum of $24,839.00, which, under the joint tenancy agreement of June 1, 1901, belonged $12,419.50 to himself and $12,419.50 to his wife. In the year 1921 he received from the same sources the sum of $22,946.20, of which $11,473.10 belonged to himself and $11,473.10 to his wife.

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) Section 161 of the California Civil Code, which provides that a husband and wife may hold property as joint tenants, tenants in common, or as community property.

(b) Sections 158 and 159 of the California Civil Code, which provides that a husband and wife may create the joint tenancy by contract between themselves.

(c) IT: 1744–II–2CB–179, wherein the Treasury Department held that under the laws of California a husband and wife may enter into a partnership and if there is an agreement which shows that the intention of the parties is to create in the wife a vested interest

in the partnership as her separate property, such an agreement will change their property from community to separate property, and in such a case the wife is entitled to report as her separate income all amounts earned by her under such agreement.

7 Wherefore the taxpayer respectfully prays that this board may hear and determine his appeal.

HOMER H. TOOLEY,
Certified Public Accountant for Taxpayer,
514 Crocker Building, San Francisco, California.
FRANK G. BUTTS,
Certified Public Accountant for Taxpayer,
910–912 Investment Building, Washington, D. C.

[*Duly sworn to by Guy C. Earl; jurat omitted in printing.*]

8 TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 10, 1925.

IT:PA:4. GWF–406–60D.

Mr. GUY C. EARL,
2914 McClure Street, Oakland, California.

SIR: The determination of your income-tax liability for the taxable years 1920 and 1921, as set forth in office letter dated May 1, 1925, has been changed as a result of your protest to disclose an aggregate deficiency in tax amounting to $4,852.58. The adjustments made are shown in detail in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with

9 the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–GWF–406–60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By J. G. BRIGHT (Sgd.),
Deputy Commissioner.

STATEMENT

IT:PA-4.
GWF-406-60D.
In re Mr. Guy C. Earl, 2914 McClure St., Oakland, California.

Year	Deficiency in tax
1920	$2,420.12
1921	2,432.46
Total	4,852.58

A reaudit of your returns for the years 1920 and 1921 has been made based on your protest and the recommendations of the conferee in a conference held in this office in June 9, 1925.

1920

10 In view of the information submitted, relative to the agreement between yourself and wife, the income received from transactions in which you were joint tenants has been eliminated from your net income and included in your wife's return.

Salaries, wages, and commissions earned by you individually are deemed to be your separate income, and such income has been included in your return. Any such income assigned to your wife is in the nature of a gift.

Tax paid at source, amounting to $33.00, previously included in your income, has been eliminated in accordance with the provisions of Treasury Decision 3685.

Your total income adjusted is $32,393.68. Of this amount $3,777.34 has been included in your wife's return and $28,616.34 in your return.

The tax on your income is $3,492.53, and the additional tax liability is $2,420.12.

Statement—Mr. Guy C. Earl—1921

Your total net income of $24,124.86, previously reported, was understated by $1,000.00, the correct amount being $25,124.86. Of this amount $24,035.53 has been included in your return, and $1,089.33 eliminated and included in your wife's return, in accordance with the recommendations of the conferee.

The correct tax liability on your income of $24,035.53 is $2,535.41, and the additional tax liability is $2,432.46.

11 You are advised that in determining this tax liability personal exemption allowable on your return has been increased from $1,000.00 to $2,000.00, inasmuch as the income of your wife for this year is nontaxable.

This assessment is in addition to all other unpaid and outstanding assessments appearing upon the collector's lists.

Payment of the deficiency in tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

You will be advised of the adjustments in your wife's net income in a separate communication from this office.

Now, August 24, 1928, the foregoing petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Answer

Filed Oct. 29, 1925

Now comes the Commissioner of Internal Revenue, by his
12 attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the allegations set forth in paragraphs 1, 2, and 3 of the petition.

(2) Admits that during the year 1920 taxpayer received salaries, fees, etc., amounting to $24,839.00.

(3) Admits that during the year 1921 taxpayer received salaries, fees, etc., amounting to $22,946.20.

(4) Admits that in determining the deficiency tax set forth in said deficiency letter dated August 10, 1925, the commissioner treated the amounts set forth in paragraphs 2 and 3 of this answer as taxpayer's separate income.

(5) Denies that the commissioner erred in treating the said amounts of $24,839.00 and $22,946.20 as taxpayer's separate income.

(6) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Proposition of law: In reporting income subject to taxation an individual may not reduce the amount of salaries, wages, fees, etc., received by him during a taxable year by an agreement or contract to pay over any amount thereof to another person.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

13 Of Counsel:
ARTHUR H. MURRAY,
Special Attorney,
Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

Docket No. 7873. Promulgated February 14, 1928

GUY C. EARL, PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Salary and fees of petitioner, a resident of California, are taxable to him notwithstanding the fact that he had agreed to divide them with his wife.

H. H. Tooley, Esq., for the petitioner.

M. E. McDowell, Esq., for the respondent.

This is a proceeding for the redetermination of deficiencies in income tax for the calendar years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively. The deficiencies arise on
14 account of the action of the respondent in including in the taxable income of the petitioner the entire amount received by him during the years involved from salaries, fees, etc.

FINDINGS OF FACT

The petitioner is a resident of California. On June 1, 1901, he entered into a contract in writing with his wife, Ella F. Earl, as follows:

"It is agreed and understood between us that any property either of us now has or may hereafter receive or acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.

"(Signed) GUY C. EARL.
"ELLA F. EARL."

The above agreement has been in effect since the date thereof and all amounts received by the petitioner as income from personal services, consisting of salaries, fees, etc., as well as the income from property, have been deposited in a joint bank account.

The petitioner and the said Ella F. Earl were married in 1888. In 1901 the petitioner had accumulated considerable property,
15 consisting of cash, bonds, lands, and other property. The petitioner's wife had about $30,000 worth of property when they entered into the agreement above set out. At the time the petitioner was not very well and suggested to his wife that it might be

wise for them to enter into such an agreement, which would simplify affairs in case he died during her lifetime, and that "it would take care of her and leave the matter for her administration."

At approximately the same time the contract was entered into the joint bank accounts were made.

The petitioner's salary as an officer of the Great Western Power Company and fees received as an attorney were deposited in these joint accounts immediately upon receipt thereof. Mrs. Earl has at all times had the right to draw against the accounts at will.

In the year 1920 the petitioner received as salary, feet, etc., the sum of $24,839.00, and in the year 1921 he received from the same sources $22,946.20.

The petitioner included only one-half of the above amounts as being his taxable income in his income-tax returns for the years involved. The respondent determined that the entire amount of such income was taxable to the petitioner and that no part thereof was taxable to the wife.

OPINION

TRAMMELL: In determining the deficiencies here involved the respondent gave effect to the agreement set out in the findings of fact in so far as income from property was concerned, holding that
16 one-half of the amounts received from such sources was taxable to the petitioner's wife, but held that the entire amounts of $24,839 and $22,946.20, received in 1920 and 1921, respectively, as salary, fees, etc., were taxable to the petitioner.

It was contended, in view of the contract entered into in 1901, that one-half of the above amounts should be taxable to the petitioner's wife upon the ground that it became her income upon its receipt by the petitioner.

The petitioner in his brief cites many cases to the effect that husband and wife may by contract change the character of their property from community to separate property; that is, the husband and wife may enter into an agreement that the earnings of the wife may be her separate property. Authorities are also cited to the effect that under the California law a contract such as set out above constituted an equitable assignment of future earnings.

We have no disagreement with the authorities cited by the petitioner. It may be conceded that under the law of California the petitioner's wife had a right under the contract to receive one-half of her husband's earnings, but this was at most an assignment of a portion of the petitioner's earnings. As between the parties the contract may be perfectly legal and enforceable. He might have been compelled to turn over to his wife one-half of the earnings, but the salary and fees involved here first became his earnings. In the case of Blair vs. Roth, decided by the Circuit Court of Appeals, Ninth Circuit (not yet reported), the court held that an
17 agreement such as this did not have the effect of preventing the earnings from becoming community property. The earn-

ings are taxable to the petitioner when received. (U. S. vs. Robbins, 269 U. S. 315.)

In view of the foregoing, it is our opinion that the amounts received by the petitioner as salary, fees, etc., should be taxable to him.

Reviewed by the board.

Judgment will be entered for the respondent.

Milliken concurs in the result.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals, Washington

Docket No. 7873

GUY C. EARL, PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, respondent

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated February 14, 1928, it is ordered and decided that, upon redeter-
18 mination, there is deficiency for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively.

(Signed) CHARLES M. TRAMMELL,
Member United States Board of Tax Appeals.

Dated Washington, D. C., ————.

Entered Feb. 16, 1928.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of withdrawal of counsel

Filed Aug. 1, 1928

The undersigned, Homer H. Tooley, hereby gives notice of his withdrawal as counsel for petitioner in the above-entitled proceeding.

Dated at San Francisco, California, July 21, 1928.

HOMER H. TOOLEY.

19 Receipt of service of copy of the above and foregoing notice of withdrawal of counsel is hereby acknowledged this 1st day of August, 1928, at 2.30 p. m.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of appearance of counsel

Filed Aug. 1, 1928

The undersigned, Warren Olney, Jr., J. M. Mannon, Jr., and Henry D. Costigan, hereby give notice of their appearance as counsel for petitioner in the above-entitled proceeding, in the place
20 and stead of Homer H. Tooley, and hereby designate as their mailing address 1500 Balfour Building, San Francisco, California.

Dated at San Francisco, California, July 23, 1928.

WARREN OLNEY, Jr.
J. M. MANNON, Jr.
HENRY D. COSTIGAN.

Receipt of service of copy of the above and foregoing notice of appearance of counsel is hereby acknowledged this 1st day of August, 1928, at 2.30 p. m.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

In United States Circuit Court of Appeals, Ninth Circuit

GUY C. EARL, PETITIONER AND APPELLANT, VS. DAVID H. BLAIR, Commissioner of Internal Revenue, respondent and appellee

21 *Petition for review of decision of the United States Board of Tax Appeals*

Filed Aug. 2, 1928

To the honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy C. Earl, the above-designated petitioner and appellant (hereinafter called petitioner) and files this petition for the review of the decision, findings of fact, and opinion of the United States Board of Tax Appeals rendered and promulgated on the 14th day of February, 1928, and the order of redetermination of said board entered on the 16th day of February, 1928, approving and redetermining deficiencies in income taxes of the petitioner for the calendar years 1920 and 1921 in the respective amounts of $2,420.12 and $2,432.46; and your petitioner respectfully shows:

STATEMENT OF THE NATURE OF THE CONTROVERSY

1. The said respondent and defendant in error above designated (hereinafter called respondent) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States of America.

2. Petitioner made his returns of income taxes with respect to his income for the years 1920 and 1921 to the collector of internal revenue at San Francisco, California. Petitioner is now and was during said years and at the respective times of making said returns,
22 and at all other times herein mentioned, an inhabitant of the city of Oakland, in the county of Alameda and State of California.

3. Pursuant to the provisions of sections 273 and 274 of Title II of the revenue act of 1924 said respondent, as such Commissioner of Internal Revenue, determined deficiencies in the taxes of petitioner for the said years 1920 and 1921, and on the 10th day of August, 1925, mailed a notice of said deficiencies to said petitioner; thereafter, to wit, on or about the 8th day of October, 1925, pursuant to section 274 of said Title II of said revenue act of 1924, petitioner filed a verified appeal petition with the United States Board of Tax Appeals wherein petitioner appealed from the determination by the said respondent of the said deficiencies.

4. In and by said appeal petition filed with said board petitioner alleged as follows:

That petitioner was at the time of filing said petition an individual residing in Oakland, California; that under date of June 1, 1901, petitioner and his wife, Ella F. Earl, executed a certain contract in writing in the words and figures as follows:

OAKLAND, *June 1, 1901.*

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered and hereby is
23 declared to be received, held, taken, and owned by us as joint tenants and not otherwise with the right of survivorship.

GUY C. EARL.
ELLA F. EARL.

That said agreement had ever since the date thereof been and still was at the time of filing said petition in full force and effect; that there was ample consideration for the agreement in that petitioner's said wife, at the time the agreement was executed, had upwards of $30,000 of separate property which she put under the agreement; that there was also community property existing at the time, and each party had an expectancy of inheritance; that petitioner had no separate property; that petitioner and his said wife were resident in California at the time when said agreement was executed and have ever since lived in California; that the agreement was in effect during the taxable years 1920 and 1921; that in the year 1920 petitioner received as salary, fees, and other earnings,

made in California, the sum of $24,839.00, which under the joint tenancy agreement of June 1, 1901, belonged $12,419.50 to himself and $12,419.50 to his wife; that in the year 1921 petitioner received from the same sources the sum of $22,946.20, of which $11,473.10 belonged to himself and $11,473.10 to his wife under said agreement; that the Commissioner of Internal Revenue, respondent herein, contended and held that the said agreement between petitioner and his wife did not extend to salary, wages, and commissions earned by him individually, but that all of such salaries, wages, and commissions were the separate income of petitioner and should have been reported on his return for income-tax purposes; wherefore the said petitioner prayed that said United States Board of Tax Appeals would hear the proceeding and determine his appeal.

5. Thereafter, on or about the 29th day of October, 1925, respondent filed with said Board of Tax Appeals his answer to the said petition, which answer admitted that petitioner was an individual residing in Oakland, California; that during the year 1920 petitioner received salary, fees, etc., amounting to $24,839.00; that during the year 1921 the petitioner received salary, fees, etc., amounting to $22,946.20; that in determining the deficiency set forth in said deficiency letter dated August 10, 1925, the commissioner treated all of said amounts of $24,839.00 and $22,946.20 as the separate income of petitioner, and denied that the commissioner erred in said treatment and denied generally and specifically each and every other allegation contained in petitioner's petition on appeal.

6. The cause, being then at issue under the rules and practices of said board, duly came on for hearing on the 8th day of July, 1927, at which time petitioner submitted documentary evidence and the testimony of competent witnesses in support of the allegations of his said petition on appeal, which said documentary evidence and testimony were received in evidence by said board. At the conclusion of said hearing petitioner moved for judgment in his favor in the proceeding, and said motion was formally denied. Thereafter, on February 14, 1928, said board rendered a decision wherein said board set forth its findings of fact in substantial accordance with the facts as alleged in the petition and as hereinbefore set forth, together with an opinion in which it was held as a matter of law that all of the said earnings of petitioner amounting to $24,839.00 for the year 1920 and $22,946.20 for the year 1921 were taxable income to the petitioner. On February 16, 1928, said board entered its final order of redetermination approving and redetermining the deficiencies for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively.

DESIGNATION OF COURT OF REVIEW

Petitioner is, and was at all times herein mentioned an inhabitant of the State of California, residing in the city of Oakland, in the county of Alameda, in said State, and being aggrieved by the said

decision, findings of facts, opinion, and order of said board, desired that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENT OF ERROR

Petitioner, as a basis for review, assigns the following errors which, he avers, occurred upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact, and opinion of said board therein, and in the order of
26 redetermination rendered, given, and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

1. The said board erred in denying at the hearing of said cause the motion for judgment made by petitioner.

2. The said board erred in rendering its decision for respondent herein.

3. The said board erred in determining that there were deficiencies in the taxes of petitioner for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively, or in either of said amounts, or in any amount or amounts at all.

4. The said board erred in holding that the agreement dated June 1, 1901, between petitioner and his wife, Ella F. Earl, found by said board to have been duly made and to be fully in effect, did not make one-half of petitioner's earnings for each of the years 1920 and 1921 taxable income of said Ella F. Earl, but that all of said earnings were the taxable income of petitioner in spite of said agreement.

5. The said board erred in holding that the agreement dated June 1, 1901, between petitioner and his wife, Ella F. Earl, found by said board to have been duly made and to have been fully in effect, did not make petitioner's earnings for each of the years 1920 and 1921 joint taxable income to petitioner and said Ella F. Earl, so that each was taxable upon one-half thereof, but that all of said earnings were the taxable income of petitioner in spite of said agreement.

27 6. The said board erred in holding that petitioner and his said wife, although resident in California, could not by agreement change the status of earnings or other future income from community to separate income of said wife, upon which she alone would be taxable.

7. The said board erred in holding that petitioner and his said wife, although resident in California, could not by agreement change the status of earnings or other future income from community income to joint income, upon one-half of which said wife alone would be taxable.

8. The said board erred in holding that the income of petitioner and his wife, which petitioner and his wife agreed by written agree-

ment validly in effect between them should be joint property simultaneously with its receipt, was either not such joint property, or if joint property was nevertheless taxable wholly to petitioner and not one-half to his said wife.

Wherefore the above-named petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said board, and direct the entry of a decision and order by said board in favor of the petitioner determining that there is no deficiency in income taxes due from petitioner for either of the years 1920 or 1921, and that the clerk of the said board be directed to transmit and
28 deliver to the clerk of said court certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

GUY C. EARL,
Petitioner and Appellant.

WARREN OLNEY, JR.,
J. M. MANNON, JR.,
HENRY D. COSTIGAN,
Attorneys for Petitioner and Appellant,
1500 Balfour Building, San Francisco, California.

[*Duly sworn to by Guy C. Earl; jurat omitted in printing.*]

29 [Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing of petition for review

Filed Aug. 2, 1928

To C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Washington, D. C.,
Attorney for Respondent.

SIR: Please take notice that on the 2d day of August, 1928, the undersigned presented to the United States Board of Tax Appeals, and filed with the clerk thereof, the petition of Guy C. Earl, a copy of which is annexed hereto for the review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision, findings

of fact, and opinion of said board in the above-entitled pro-
30 ceeding rendered and promulgated on the 14th day of Febru-
ary, 1928, and the order of redetermination of said board entered in the said proceeding on the 16th day of February, 1928.

Dated Washington, D. C., August 2d, 1928.

WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
HENRY D. COSTIGAN,
Attorneys for Petitioner and Appellant,
1500 Balfour Building, San Francisco, California.

Receipt of service of copy of the above and foregoing notice and copy of petition for review in the above proceeding is hereby acknowledged this 2d day of August, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to the foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

31 *Order denying inclusion of statement of evidence in transcript*

The petitioner herein having filed a petition for review of the decision of the board by the Circuit Court of Appeals for the Ninth Circuit and having lodged for the approval of the board a proposed statement of evidence to be included in the record for review, and the respondent having objected to the inclusion in the record for review of any statement of evidence, a hearing before the board was held on August 21, 1928, pursuant to notice duly served upon the respective attorneys.

It appearing to the board that the petitioner, in his petition for review, has assigned no error with respect to the admission or rejection of evidence or to the effect that any finding of the board is unsupported by any evidence, and has assigned error only with respect to the legal conclusions of the board based upon findings of facts which are not put in issue in the appellate proceeding, and it further appearing to the board that the petitioner, in his petition for review, recites that the "board rendered a decision wherein said board set forth its findings of fact in substantial accordance with the facts as alleged in the petition and as hereinbefore set forth," the board having heard arguments of counsel and being of the opinion that a statement of evidence is not essential to a decision of the questions

raised by the appeal and is not properly a part of the record
32 for review in this appeal prepared in accordance with the rules of the Circuit Court of Appeals for the Ninth Circuit, it is

ORDERED that no statement of evidence shall be included in the transcript of record for review to be certified herein to the Circuit Court of Appeals for the Ninth Circuit.

Dated at Washington, D. C., this 12th day of September, 1928.

C. M. TRAMMELL,
Member, U. S. Board of Tax Appeals.

Approved as to form.

VOGELSANG, BROWN, CRAM & FEELY,
By WM. G. FEELY.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

33 *Exception to order denying inclusion of statement of evidence in transcript*

Be it remembered that the petitioner herein duly lodged his proposed statement of evidence with this board, to which respondent entered his objection, and hearing therein was had before the board on August 21, 1928.

Whereupon the board made its order as follows:

"ORDERED that no statement of evidence shall be included in the transcript of record for review to be certified herein to the Circuit Court of Appeals for the Ninth Circuit."

To said order petitioner then and there duly noted his exception upon the ground that petitioner is entitled to carry up a complete record of the case and that the same is indispensable to a proper presentation of petitioner's case to the Circuit Court of Appeals for the Ninth Circuit.

Dated at Washington, D. C., this 12th day of September, 1928.

C. M. TRAMMELL,
Member, U. S. Board of Tax Appeals.

[Certificate to foregoing paper omitted in printing.]

34 *Before United States Board of Tax Appeals*

[Title omitted.]

Præcipe for record

Filed September 12, 1928

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, and within sixty days from the date of the filing of the petition for review in the above-stated cause transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above-entitled cause.

2. The petition on appeal to the Board of Tax Appeals, including the exhibit thereto attached, consisting of letter from the Commissioner of Internal Revenue to Mr. Guy C. Earl, dated August 10, 1925, and notifying said Guy C. Earl of deficiencies in taxes with attached statements.

3. The answer of the Commissioner of Internal Revenue to said petition.

35 4. The order of the board denying inclusion of statement of evidence in transcript.

5. The exception of petitioner to order of the board denying inclusion of statement of evidence in transcript.

6. The decision of the board promulgated February 14, 1928, consisting of findings of fact and opinion.

7. The order of redetermination of the board entered February 16, 1928.

8. The withdrawal of Homer H. Tooley as counsel for petitioner.

9. The appearance of Warren Olney, jr., J. M. Mannon, jr., and Henry D. Costigan as counsel for petitioner.

10. The petitioner for review filed on August 2, 1928.

11. The original notice of filing petition for review, showing service of petition and notice on counsel for respondent.

12. This præcipe for the record.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 12th, 1928.

WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
HENRY D. COSTIGAN,
Counsel for Petitioner.

36 Receipt of service of copy of the above and foregoing præcipe for the record is hereby acknowledged this 12th day of September, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

37 In United States Circuit Court of Appeals, Ninth Circuit

38 [Minute entry of argument and submission Feb. 14, 1929, omitted in printing.]

39 In United States Circuit Court of Appeals

GUY C. EARL, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, respondent
No. 5602

Order directing filing of opinion and filing and recording of judgment

Feb. 25, 1929.

By direction of the honorable Frank H. Rudkin and Frank S. Dietrich, Circuit Judges, and Robert S. Bean, District Judge, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

40 In United States Circuit Court of Appeals, Ninth Circuit

GUY C. EARL, APPELLANT
vs.
COMMISSIONER INTERNAL REVENUE, appellee
No. 5602

Upon petition to review an order of the United States Board of Tax Appeals.

Before RUDKIN and DIETRICH, Circuit Judges, and BEAN, District Judge.

Opinion

Filed Feb. 25, 1929

BEAN, District Judge: This is a petition for review of a decision of the Board of Tax Appeals. (Sec. 1001, revenue act of 1926.) The petitioner is and was during the times hereinafter mentioned a married man domiciled in the State of California. In 1920 and 1921, the years here involved, he earned for personal services the sums of $24,339.00 and $22,946.20. He and his wife made separate income-tax returns for the years stated, each returning one-half of the above amounts. The Commissioner of Internal Revenue ruled that the entire amount of the petitioner's earnings was taxable to him, and no part to his wife, and as a result determined that there was a deficiency in the tax paid by the petitioner in the sums of $2,420.12

for 1920, and $2,432.46 for 1921. From this decision the petitioner appealed to the Board of Tax Appeals, where the ruling of the commissioner was sustained.

41 There is no dispute as to the facts. On the first day of June, 1901, the petitioner and his wife entered into a contract in writing as follows: "It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship."

This agreement has been continuously lived up to by the petitioner and his wife throughout the years, and at the time it was made a bank account was opened in their joint names and subject to the check of either, and in this account all incomes, including earnings of the petitioner, have been deposited immediately upon their receipt. It was by reason of these facts that separate income-tax returns were made by the petitioner and his wife.

The question for decision is whether the contract referred to is a valid and binding obligation, and such as a husband and wife may legally make, and if so whether under its provisions the personal earnings of the petitioner immediately became the joint property of himself and wife as soon as earned. Or was there an interval before the title passed to their joint estate during which time such earnings were impressed with the community-property status, and returnable by and taxable to him under U. S. vs. Robbins (269 U. S. 315)?

42 Sections 162, 163, and 164 of the Civil Code of California provide that all property owned by either spouse before marriage or thereafter acquired by gift, bequest, devise, or descent, with the rentals, issues, and profits thereof, is separate property, and all other property acquired after marriage by either spouse belongs to them as community property; but by the same law a husband and wife may enter into any engagement or transaction with the other respecting property which either might if unmarried (sec. 158), and they may hold property as joint tenants, tenants in common, or as community property (sec. 161). It is consequently the holdings of the Supreme Court of California that an agreement between a husband and wife domiciled there, without any other consideration than their mutual consent that the future earnings of the wife should be her separate property is valid, and such earnings do not become community property. (Wren vs. Wren, 100 Cal. 276; Cullen vs. Bisbee, 168 Cal. 695; Kaltschmidt vs. Weber, 145 Cal. 596.) If, as thus seems to be the settled law of the State, and which is recognized as such by the Board of Tax Appeals (In re Krull, 10 B. T. A. 1096), a husband and wife may legally agree by contract

that the future earnings of the wife shall be her separate property, and by virtue of such agreement they do not become the property of the community, there is no sufficient reason why they may not make a similar agreement with reference to the earnings of the husband or, as here, that their joint earnings shall belong to them jointly and not otherwise.

Under the California system there is no difference between the earnings of the wife and the earnings of the husband. They are each community property (Martin vs. Southern Pacific, 130 Cal. 285), and an agreement of husband and wife that her future earnings may nevertheless be her separate property differs in no way in principle from an agreement that his earnings may be the joint property of both. (Estate of Harris, 169 Cal. 725.)

43

We conclude therefore that the contract is valid and such as a husband and wife may legally make.

The remaining question is its proper construction. The petitioner claims that by its terms his personal earnings became the joint property of himself and wife immediately upon being earned, while the position of the Government is that, notwithstanding the language of the contract, there was an interval of time during which his earnings belonged to the community and were taxable as such. We are unable to agree with this latter view. The language of the contract is that the earnings, including salaries, fees, etc., of either spouse shall be treated and considered and "is hereby declared to be received, held, taken, and owned" by them as joint tenants and not otherwise.

This clearly indicates an intention that the earnings of either spouse shall not be received and held by the community but by them as joint tenants. The Board of Tax Appeals and the Government seem to rely principally on the decision of this court in Blair vs. Roth (22 Fed. 2d, 932). In that case the contract as construed by the court amounted to nothing more than an agreement between a husband and wife that they would contribute their earnings to a common fund out of which their personal and community expenses would be paid and the savings, if any, would be owned by them jointly. There was no agreement, as here, that the earnings of either spouse should be received and held and owned as the joint property of both, but merely that each would contribute his or her earnings to a common fund. It is evident that the parties here did not have in mind that the future earnings of either should first be received by him or her and then turned over to a joint tenancy; but the intention clearly expressed is that the earnings should be received, taken, and held from the very beginning as the joint property of both.

44

Decree of Board of Tax Appeals reversed.

[File endorsement omitted.]

45 In United States Circuit Court of Appeals

No. 5602

GUY C. EARL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed Feb. 25, 1929

Upon petition to review an order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this court that the order of the said Board of Tax Appeals in this cause be, and hereby is, reversed.

[File endorsement omitted.]

46 In United States Circuit Court of Appeals

Application for stay of mandate

[Postal Telegraph—Commercial cables—Telegram]

F50 SFFG 1201P 35 2 Extra. Govt. Blue. April 22, 1929.

V WASHINGTON, D. C., *Apr. 20, 1929.*

UNITED STATES ATTORNEY,

San Francisco.

Pending decision Solicitor General on recommendation for certiorari, please get a further stay of mandate in Guy C. Earl v. Commissioner, number five six naught two, decided by your Circuit Court of Appeals.

MITCHELL, *Attorney General.*

47 In United States Circuit Court of Appeals

[Title omitted.]

Order staying issuance of mandate

Filed April 22, 1929

Upon telegraphic application of Hon. W. D. Mitchell, Attorney General, counsel for the respondent, and good cause therefor appearing, it is ordered that the issuance, under rule 32, of the mandate of this court in the above cause be, and hereby is, stayed to and includ-

ing May 20, 1929; and in the event the petition for a writ of certiorari to be made by the respondent herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated San Francisco, California, April 22, 1929.

[File endorsement omitted.]

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34224. United States Circuit Court of Appeals, Ninth Circuit. Term No. 99. Robert H. Lucas, as Commissioner of Internal Revenue, petitioner, vs. Guy C. Earl. Petitioner for writ of certiorari and exhibit thereto. Filed May 20th, 1929. File No. 34224.

U. S. GOVERNMENT PRINTING OFFICE: 1929